No. 92-767

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF FLORIDA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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TABLE OF AUTHORITIES

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In the jurisdictional statement, we explain that the district court abused its discretion when it refused to conduct remedial proceedings to determine whether it could provide complete relief for the Section 2 violations it had found. Appellees do not respond to our argument directly. Instead, they move to dismiss or affirm on three other grounds.

1. Contrary to appellees' contentions (Mot. to Dis. or Aff. 12-14), the questions presented in the jurisdictional statement are squarely raised by the judgment in this case. Under the terms of Rule 58, Fed. R. Civ. P., a "judgment" is an order granting or denying relief. In this case, the judgment was that the State should implement its plan for 1992 and succeeding years. Cf. *California* v. *Rooney*, 483 U.S. 307, 311 (1987) ("the judgment • • • was entirely in the State's favor"). The jurisdictional statement asks this Court to review that judgment,

which directs that the State must continue to use its Senate redistricting plan and denies relief to the United States.[1]

It is true that the ground on which we seek reversal of the district court's judgment was influenced by the district court's opinion. But that is entirely appropriate. The district court's opinion did not in any way disturb the judgment; the opinion simply explained the ground on which the judgment was based. Nothing in Rule 58 or in any of the other authorities cited by appellees (Mot. to Dis. or Aff. 12-13) prohibits a district court from explaining the ground of a judgment in a subsequent opinion. We have simply followed the entirely conventional course of making use of the court's opinion to frame the questions presented for review.

Appellees rely on the statement in the document embodying the district court's judgment that the State's plan did not violate Section 2. At best, however, that statement simply created an ambiguity, since it was inconsistent with the court's judgment ordering the State to implement its plan—an action that the court would have had no authority to take in the absence of a violation of federal law. See J.S. 9 n.7. Appellees concede that "an opinion may sometimes help in the interpretation of an *ambiguous* judgment." Mot. to Dis. or Aff. 13. Accordingly, even under appellees' reasoning, the United States quite properly relied on the district court's opinion to resolve the ambiguity and frame the questions presented in this case.

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[1] Immediately after trial, the court orally explained its ruling as follows: "The Court finds that plaintiffs have shown a fourth Hispanic district can be drawn * * * but * * * have failed to prove that [it] can be drawn without creating a regressive effect upon Afro-American voters." VII Tr. 184; J.S. App. 100a. The court later withdrew that explanation, commenting that it could only say that it had "ruled against all plaintiffs and in a written order there may be more definition as to exactly the rulings as to each claim." VII Tr. 191; J.S. App. 105a.

Finally, appellees argue that there was no ambiguity, since the court's order directing the State to implement its plan could be read as "a formalization of an earlier oral ruling, which was made in order to eliminate the need for further Section 5 preclearance by the Justice Department." Mot. to Dis. or Aff. 13 (emphasis omitted). Appellees are correct that prior to trial the district court had adopted the State's redistricting plan "in order to give the parties a formal plan to challenge" under Section 2. J.S. App. 20a n.11. But that purpose expired at the end of the trial. Appellees do not explain how, if the court unambiguously found no violation of federal law, the court nonetheless retained the authority to require the State to implement its plan for the indefinite future.

2. Appellees argue that the State's plan provides proportional representation in both Dade County and a seven district area that includes Dade County. Mot. to Dis. or Aff. 15-17. That showing, appellees contend, automatically defeats a Section 2 claim. *Ibid.*

In our motion to affirm in part and vacate in part in No. 92-519, another appeal from the same case, at 11-14, we responded to a similar contention. We explained that when plaintiffs challenge the redistricting of a body with statewide jurisdiction, any defense based on proportional representation must be statewide as well. Appellees did not assert below that there was statewide proportional representation. Nor did they offer evidence that would support that conclusion. Accordingly, the district court properly rejected appellees' proportional representation defense.

Appellees argue that our statewide focus is a "new" one, and that, until now, we have alleged only that the state plan violated the rights of Hispanics in the Dade County area. Mot. to Dis. or Aff. 23. Appellees are mistaken. The complaint filed by the United States alleges that the fragmentation of the Hispanic population concentrations in the Dade County area (J.S. App. 79-80a) has "deprive[ed] Hispanic citizens * * * *in the*

State of Florida of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature." J.S. App. 81a (emphasis added). In our closing argument at trial, we were equally explicit. We stated that "this case is not about Dade County." VIII Tr. 25. We noted that the "State's defense in this case basically boils down to you carve out Dade County from the state of Florida and then you look to see how many districts you can draw in Dade County." *Ibid.* And we argued that that defense should not prevail because "[i]t is not the Dade County Senate. It is the Florida State Senate." *Ibid.*

Appellees argue that our statewide focus "has no basis whatever" because what happens to minority voters in Dade County cannot possibly be relevant to Hispanic voters in other parts of the State. Mot. to Dis. or Aff. 22-23. That argument misapprehends the nature of a vote dilution suit. See 92-519 U.S. Mot. to Aff. in Part and Vacate in Part at 12. In vote dilution cases, minority voters in the challenged political unit often live outside the remedial districts. But that does not mean that vote dilution cases are brought only on behalf of those minority voters who end up in remedial districts. Rather, by drawing minority districts, a court remedies vote dilution throughout the political unit. See *McGhee* v. *Granville County*, 860 F.2d 110, 118-119 & n.9 (4th Cir. 1988); *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), cert. denied, 492 U.S. 905 (1989); *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989).

This case is precisely parallel to *Davis* v. *Bandemer*, 478 U.S. 109 (1986), which involved a claim that state legislative district lines were drawn to dilute the votes of Democrats, in violation of the Equal Protection Clause. The plurality recognized that, although plaintiffs "cited instances of individual districting within the State which [plaintiffs] believe exemplify * * * discrimination," the plaintiffs' claim was "that Democratic voters over the

State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination." *Id.* at 127. Two Justices who did not join the plurality agreed: "If Democratic voters in a number of critical districts are the focus of unconstitutional discrimination, * * * the *effect* of that discrimination will be felt over the State as a whole." *Id.* at 169 (Powell, J., concurring in part and dissenting in part).

As the Fourth Circuit explained in *McGhee*, "the claim of dilution * * * is made by a class consisting of *all* the [minority] voters of the jurisdiction" even though "not all can be placed in safe districts." 860 F.2d at 118 n.9. "That not all can be given the remedy of assured *direct* representation," the Fourth Circuit explained, "does not * * * mean that the remedy is wholly ineffectual as to those not included in 'safe' districts." *Ibid.* Rather, "[o]nce the concept of racial group 'interest' representation is accepted * * * it must in logic be assumed that the special interests of minority voters not included in safe districts will nevertheless be 'represented,' albeit less directly, by those minority candidates elected from 'safe' districts." *Ibid.* See also *Baird* v. *The Consolidated City of Indianapolis*, 976 F.2d 357, 359-360 (7th Cir. 1992) (proportional representation should be determined by the "success by minorities throughout the jurisdiction as a whole").

The cases cited above belie appellees' contention that there is "no authority" to support our statewide approach. Mot. to Dis. or Aff. 23. Moreover, two district courts have explicitly applied a statewide test of proportionality. *Shaw* v. *Barr*, C.A. No. 92-202-CIV-5-BR (E.D.N.C. Aug. 7, 1992), prob. juris. noted, 113 S. Ct. 653 (1992); *Shayer* v. *Kirkpatrick*, 541 F. Supp. 922, 930 n.7 (W.D. Mo.), aff'd, 456 U.S. 966 (1982). In support of their approach, appellees cite a single district court decision, *Nash* v. *Blunt*, 797 F. Supp. 1488, 1499 (W.D. Mo. 1992). That decision simply asserts, without analysis, that a statewide test is inappropriate.

The merits of a statewide approach are clear when that test is compared to the alternatives. Appellees assert that the relevant area for measuring proportional representation in this case is either Dade County or a seven-district area that includes five all-Dade districts and two districts made up of portions of Dade and portions of adjacent counties. Mot. to Dis. or Aff. 17. But appellees offer no explanation for their choices. In particular, appellees do not explain why Dade County should be the relevant area, when the State itself does not follow county lines in redistricting. Similarly, they offer no justification for treating Dade and the areas the State combined with it as the relevant area, when the State's decision to combine some areas with Dade County and not others is part of what prevented the State from drawing four Hispanic majority districts and led to the violation in this case.

At bottom, appellees offer no answer to our argument that a regional approach cannot work. In particular, plaintiffs will almost always be able to define an area in which there is not proportional representation, while defendants will almost always be able to define an area in which there is. See 92-519 U.S. Mot. to Aff. in Part and Vacate in Part at 13. Only a statewide test provides an objective measure of proportional representation in a statewide body.

Finally, appellees argue that recent census figures show that there is statewide proportional representation. The census figures to which appellants refer are those cited in our motion to affirm in part and vacate in part in No. 92-519, at 14 n.5, which show that the citizen voting age population in the State of Florida is 7.15% Hispanic. Noting that courts routinely take judicial notice of census figures, appellees criticize as "nonsense" our argument that the significance of this 7.15% figure should not be addressed by this Court. Mot. to Dis. or Aff. 22 n.23.

As we explain in the same footnote in which we first brought the census figures to the attention of this Court

and the parties to this case, remand to the district court is dictated by orderly litigation practice. The 7.15% figure was not released in a formal census publication, but in a special tabulation prepared for the Department of Justice for a different purpose. While we accept its validity, we could not be sure that every party would. In fairness, we believe that this Court should not resolve the case on the basis of unpublished census figures that some parties have not had the opportunity to examine.

More important, we specified a number of legal issues that would have to be resolved before a court could accept appellees' contention that the census figures are dispositive in this case. See 92-519 U.S. Mot. to Aff. in Part and Vacate in Part at 14 n.5. Appellees simply ignore those issues. For example, while appellees insist that proportional representation must be measured in reference to citizen voting age population, the De Grandy plaintiffs have taken the position that may not be the proper measure when the State counts noncitizens for redistricting purposes. See De Grandy Mot. to Dis. or Aff. 13-16. In addition, although proportional representation is generally a defense to a Section 2 claim, it is not clear that it automatically ensures victory for the defendant. See *Thornburg* v. *Gingles*, 478 U.S. 30, 77 & n.38 (1986) (opinion of Brennan, J.) (proportional representation is defense except in "special circumstances"); *id.* at 104 (O'Connor, J., concurring in the judgment) (proportional representation is "entitled to great weight"); *id.* at 106-107 (Stevens, J., concurring in part and dissenting in part) (proportional representation is only one relevant factor). Because appellees never asserted a statewide defense and because the census figures were unavailable at the time of trial, the issues discussed above were not litigated before the district court and are not properly before this Court.

3. Appellees also argue that the judgment should be affirmed on the basis of the district court's finding that, because the court believed that no plan including four

Hispanic seats and three African-American seats can be drawn, the State's plan is the fairest plan possible. Mot. to Dis. or Aff. 24. In appellees' view, that finding establishes that there is no Section 2 violation and obviates the need for a remedial proceeding.

The district court's "fairness" finding was predicated on its conclusion that the plaintiffs had not shown that a "4-3" plan was possible. Had the court viewed such an "ideal solution," J.S. App. 60a, as possible, it would not have adopted the State's plan as the remedy. The court's finding that the "ideal solution" was not possible, however, was flawed because the court did not provide the parties with an opportunity to prove that a "4-3" plan offering complete relief to both Hispanics and African-Americans could be drawn. See J.S. 12-17.

Appellees argue that the parties were on notice of the need to draw a 4-3 plan, because the district court ruled at trial that it would consider whether the creation of a fourth Hispanic majority district would have a regressive effect upon African-American voters. Mot. to Dis. or Aff. 27. Under the court's "regression" standard, a plan introduced by the plaintiffs would have had to include not only two African-American majority districts, but also one additional African-American "influence" district, as the State's plan did. The "regression" issue, however, was entirely distinct from any requirement that a 4-3 plan be developed.

The plaintiffs in this case met their burden to satisfy the "regression" criterion by introducing a plan at trial that would have created four Hispanic districts, two African-American districts, and an additional influence district that had a voting age population (VAP) that was 47.1% African-American. See J.S. App. 62a. The court found that the plan was "retrogressive," however, because the African-American influence district in that plan was inferior to the African-American influence district in the State's plan, which had an African-American VAP of

only 35.5%. See J.S. App. 65a. The court reached that conclusion on the basis of its finding that African-Americans would not be "in control on the general election day" in the 47.1% influence district in plaintiffs' plan. J.S. App. 63a.

The court's conclusions concerning influence districts are questionable. Initially, the court may have erred in conditioning relief for a proven Section 2 violation as to Hispanics on the continued maintenance of an influence district for another minority group. Appellees are correct that this Court in *Voinovich* v. *Quilter*, No. 91-1618, need not address that issue directly, since *Voinovich* does not concern remedial issues. Mot. to Dis. or Aff. 28-29. But, insofar as the Court addresses the question of influence districts at all in *Voinovich*, the question in this case—in appellees' terms, whether "a court can properly remedy a violation against one minority by impairing [an influence district of] another minority, which * * * has also had its Section 2 rights violated," Mot. to Dis. or Aff. 29—may well be clarified. If, for example, "minority influence districts [do] not have * * * a legally protected status," it would be at least doubtful whether "a court's desire to preserve an influence district could * * * take precedence over its obligation to fashion complete relief for a proven violation." J.S. 17.

Furthermore, the court's conclusion that the plaintiff's plan was "regressive" is highly doubtful. The court's conclusion that a 47.1% minority district is "ineffective" because it would not be "controlled" by the minority group, J.S. App. 63a, says nothing about whether the minority group would have *influence* in such a district. Again, insofar as the Court in *Voinovich* addresses the question of how an influence district is to be defined, its decision in that case would be likely to affect the analysis of the influence district issues in this case. See J.S. 18.

The difficult questions concerning the definition and legal status of influence districts in Section 2 litigation

were not fully developed in this litigation, nor, in its rush to decide this case, see J.S. 16, did the district court fully explain the legal premises underlying its holdings. The need to address those questions can be obviated by remanding the case to the district court for appropriate remedial proceedings. If, as we believe will be shown, a 4-3 plan is possible, the analysis of the legal status of influence districts in this case will be unnecessary. Although appellees assert that that result is unlikely, see Mot. to Dis. or Aff. 27, they disregard the fact that the De Grandy plaintiffs have already offered a motion for reconsideration containing a 4-3 plan, see J.S. 13, and we are confident that there are other ways to accomplish the same result.

Respectfully submitted.

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